Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD C. REMUS, TRUSTEE FOR
SUPERIOR METAL SHREDDERS, INC.,
Petitioner,

v.

CITY OF KALAMAZOO,
Respondent.

On Petition For A Writ of Certiorari
From The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTORARI

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QUESTIONS PRESENTED

1. Under the "Full Faith and Credit" provision of 28 U.S.C. §1738 (a federal court is to give a prior state court adjudication the same effect it would have in the state court) was Petitioner's 1995 Federal District Court "Federal Taking Claim" under the Fifth Amendment barred by state res judicata principles?

2. Does government regulation that compels a corporation to file for reorganization under Chapter 11 bankruptcy amount to a federal "taking"?

3. Does government revocation of a license to operate a business amount to a "taking"?

4. Has one more citizen of this country now been denied his federal rights in unpublished opinions which are the law for this one citizen, but contrary to the general law of the land?

5. Is the State of Michigan unwilling to protect Petitioner's federal rights?

PARTIES TO THE PROCEEDING

Only the Petitioner and the Respondent are parties to the proceedings.

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1. The current decisions conflict with this Court's decisions involving an important federal question that should be settled by this Court and depart from accepted and usual judicial proceedings in that under "Full Faith and Credit" provision, Title 28, U.S.C. §1738 Petitioner's claim of a "federal taking" is not precluded under the State of Michigan rule of "res judicata" for there is nothing to give " faith or

credit" to the State of Michigan trial and/or appellate courts; government regulation that compels a corporation to file for reorganization under Chapter 11 Bankruptcy does not amount to a federal "taking"; government revocation of a license to operate a business does not amount to a "taking"; one more citizen of this country has not been denied his federal rights in unpublished opinions which are the law for this one citizen, but contrary to the general law of the land; the State of Michigan is unwilling to protect Petitioner's federal rights 9

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, 96-2200, dismissing petitioner's appeal is reproduced in petitioner's appendix at A1. (there is no official citation to this unpublished opinion)

JURISDICTION

The judgment/order/opinion of the Court of Appeals was entered September 30, 1997. This court has jurisdiction under 28 U.S.C. §1254(1); Rule 10 a,c of the U.S. Supreme Court.

FEDERAL APPLICABLE LAW

The following constitutional and Statute provisions are applicable and reproduced in the Appendix:

U.S. Constitution, Amendment 5, A43
U.S. Constitution, Amendment 14, A44
U.S. Constitution, Article 5, §1, A45
Title 28, § 1738, A46
Title 42, § 1983, A47

STATEMENT OF THE CASE

In 1978 Superior Metal Shredders, Inc. placed in service one Hammond bulldog shredder costing $1.4 million with monthly payments and expenses of $60,000.00 to maintain and operate.

In October of 1979, Respondent moved to revoke Superior's 50% industrial facilities exemption certificate, although Superior was not violating any ordinances.

On December 3, 1979 the Respondent amended Section 24.20 of the Kalamazoo City Code to add a requirement that recycling dealers operate so as not to create a nuisance by reason, noise and/or vibration. . .

In April and May of 1980, the Respondent held a fact finding hearing on Superior's license renewal before the City Commission hearing officer. On June 17 Superior's recycling license was renewed with restrictions for noise and vibration.

On June 23, the Respondent's hearing officer having found the shredder was not a nuisance, the City Commission, again voted to revoke Petitioner's industrial facilities exemption. Due to the shredder being out of service for much of 1980, Superior filed (in October of 1980) in the U.S. Bankruptcy Court for protection from creditors under Chapter 11 of the Bankruptcy Act.

On December 5, 1980 an explosion occurred at the shredder with no damage to any property or persons.

On December 8, 1980 the Respondent notified Superior that the license for the shredder had been revoked due to excessive noise and the explosion of December 5.

Superior continued to operate the shredder without a license and on December 17, 1980 the Respondent filed suit against

Superior alleging a public nuisance, operating without a license, due to the explosion of December 5, 1980. A hearing was held on December 19, 1980 for a preliminary injunction before the Circuit Judge of the County of Kalamazoo, State of Michigan, upon Respondent's complaint. The court ordered a temporary injunction.

In January of 1981, vibration tests were run by the Respondent on the shredder, the shredder passed and commenced operation.

On June 12, 1981, tests conducted by the Respondent were conducted and the shredder passed.

From January 1981 to February 1983, Superior was periodically shut down by the Respondent pursuant to Respondent's motions and orders issued by the Circuit Court.

The shredder was put back in operation in May of 1983.

In July of 1983 an explosion took place at the shredder. Upon Respondent's request, the court shut down the shredder on July 23, 1983.

In August of 1983, there was a gas tank explosion and vibrations. The shredder was ordered shut down.

In January of 1984 on Respondent's request, the Circuit Court shut down the shredder for further vibration testing.

The shredder is designed to absorb explosions caused by shredding pre-crushed cars with gas or fumes still in the gas tank.

In September of 1984, upon the fourth petition of creditor's, the Chapter 11 reorganization was converted into a Chapter 7 liquidation of Superior. Petitioner Richard C. Remus was appointed Trustee.

From the time of its filing suit in circuit court against Superior, until the conversion in bankruptcy to Chapter 7 liquidation, the Respondent was designedly dilatory in its action in taking Superior to court, its doing of vibration tests so the machine could operate, and purposely seeking every opportunity to put Superior out of business.

In October of 1984, the circuit court issued a permanent injunction enjoining Superior from operating the shredder and dismissed the suit further ordering that a successor owner may petition the court for modifications.

The assets of Superior were subsequently sold.

In February of 1986, a successor owner of the shredder, Kalamazoo Metal Recycler's, Inc., (Farrell) hereinafter referred to as "successor", petitioned the court to commence business with the shredder; as of March 1, 1986 expending $126,000.00 to fix the shredder. The Circuit Court allowed the successor to start operations.

In June of 1986, after operating the shredder for three months and having three explosions, the successor petitioned the Circuit Court to: 1) change the court

ordered operating hours of 8:30 a.m. to 5:00 p.m. weekdays and no weekend operations and automatic shut down until checked by the Respondent of problems with vibrations or explosions, to 8:00 a.m. to 6:00 p.m. weekdays, 10:00 a.m. to 6:00 p.m. on Saturdays, and if a breakdown occurred including weekly explosions, the successor could open and operate one hour early on the next week day for the reason successor needed more hours of operation if successor was to meet his financial commitments; 2) additionally, the requirements of mandatory testing for vibrations was eliminated; 3) the successor/owner also argued that explosions were a necessary and unpreventable cost of operating the shredder, and the transmission and drive shafts could be run through the shredder, and that vibrations were a necessary, unpreventable happenstance due to the nature of the shredder's operation. The circuit court so modified the conditions of operation granting a 36% increase in operating hours. Superior had originally argued the same and had been originally so operating as the new conditions allowed before the original state court action.

In December of 1986, the successor obtained a dismissal of permanent injunction and the suit.

In the November 21, 1979 memo of the Respondent the City notes "to make it more difficult for Superior to have the necessary funds to cure any operation of

the shredder." A. 29.

In response to the hearing examiner, the Edison Neighborhood Council (local complaining residents) submitted a letter to the Respondent indicating the hours of operation were irrelevant if the shredder was not creating a nuisance. A. 30. Attached hereto is the Defendant there, Superior's, answer and counter-complaint to the Respondent's Complaint. A. 32.

Attached is an 8 page summary of events commencing with the restrictions imposed by the City Hearing Officer on Petitioner, the changes for the successor (Ferrall) operator up until the time of the order dismissing the entire suit on December 5, 1986. A. 35.

In 1980 the Respondent brought the state court action in Michigan against Petitioner's predecessor Superior to enjoin Superior from operating without the license revoked by Respondent, City of Kalamazoo.

Superior filed a conter-complaint alleging the license "was revoked without due process of law" and the Respondent has and is attempting to "force and compel Superior to cease operations". A. 32.

Superior remained operating for almost four years until the Chapter 7 liquidation bankruptcy.

On October 15, 1984, the state court issued a permanent injunction prohibiting Superior from operating and dismisses the state court suit. In 1986, a successor new owner of the shredder, having reopened

the case again gets the case dismissed after this new owner is granted a 36% increase in operating hours, Superior never had.

Petitioner then files in 1987 in Federal District Court a "Federal", U.S. Constitution, Amendment 5, and "State" taking claim which is then dismissed under Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172 (1985) as not "ripe", "no federal jurisdiction" as Petitioner had not pursued available state compensation. A. 14.

Petitioner files in 1989 in the Michigan state court "federal" and "state" taking claims which are dismissed on principle of state "res judicata", the state court ruling that Petitioner had raised, or could have raised the taking claim in the original 1980 state court action. An appeal to the Michigan Court of Appeals is affirmed (unpublished opinion), holding plaintiff "could have filed a specific taking claim in its 1980 counter-claim, but did not . . its taking claim in the instant suit is barred by res judicata . . we find no merit in (Petitioner's) argument that a taking claim became ripe only after the permanent injunction issued October 15, 1984. Plaintiff could have brought an action for a temporary taking after defendant (here Respondent) revoked its license in 1980. . Plaintiff's claim that the taking claim did not accrue until it filed for

bankruptcy is equally meritless." A.24. The Michigan Supreme Court denied leave to appeal. A.28. Petitioner filed a petition for a Writ of Certiori with this court which was not perfected.

On July 26, 1995, Petitioner filed a second federal district court action pursuant to 42 U.S.C. §1983, A.47, alleging a "federal taking", U.S. Constitution, Amendment 5; Amendment 14, against Respondent. It is dismissed by the Federal District Court on principle of "Full Faith and Credit", A.46, as being barred by principles of res judicata. A.14. Petitioner appealed to the Sixth Circuit Court of Appeals which rendered its per curiam unpublished opinion affirming the District Court's opinion finding a "prior state adjudication has the same effect in federal court as it would in state court". . there is nothing to suggest that the Michigan circuit court lacked jurisdiction to hear (Petitioner's) claim, Petitioner's current argument . . . is the same contention raised by Superior in its 1980 counter-complaint and in the 1989 state court action. . . Plaintiff raises no new theories of liability and offers no new facts or evidence, Superior easily could have raised a pure "taking" claim during either or both of the prior proceedings . . . Remus may not collaterally attack the state court's determination "of res judicata." A. 1.

REASONS FOR GRANTING THE WRIT

UNDER THE "FULL FAITH AND CREDIT" PROVISION, TITLE 28, U.S.C. §1738, A. 46 PETITIONER'S CLAIM OF A "FEDERAL TAKING" IS NOT PRECLUDED UNDER THE STATE OF MICHIGAN RULE OF "RES JUDICATA" FOR THERE IS NOTHING TO GIVE "FAITH OR CREDIT" TO THE STATE OF MICHIGAN TRIAL AND/OR APPELLATE COURTS.

As is universally held, a court only has jurisdiction of a "federal taking" claim after the party has first attempted to use the available state procedures for compensation, if they exist, for the federal taking claim is not "ripe" for adjudication. Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172, 175 (1985); Marcene v MJW Inc., 951 F 2d 700, 704 (6th Cir. 1991).

No claim for a "federal taking" exists until compensation has been denied under applicable state proceedings. Id. Petitioner was compelled to use the state court appellate process to have compensation denied.

A justifiable dispute is a jurisdictional prerequisite under the Federal Constitution, Article III. Allen v Wright, 468 U.S. 737, 750 (1984). Without a "justifiable dispute" the Federal Courts had no basis to retain jurisdiction of the original (1987) filing before it. This preposition was correctly

decided by Hon. Judge Gibson in his original decision, 1-6-1989, on Petitioner's first filing a federal "taking" claim. A. 14.

A federal cause of action not "ripe" (no jurisdiction to hear) is not precluded under a theory of "Res Judicata" when the federal claim is not ripe at any time during the pendency of the prior state court action. Katt v Dykhouse, 983 F.2d 690 (6th Cir. 1992).

This principle is the same for the State of Michigan. Hart v City of Detroit, 416 Mich 488 (1982); Grand Trunk Western RR v Detroit, 326 Mich 387 (1949).

Additionally, no "taking claim", whether state or federal "accrues" (comes into existence) until the dispute which may or may not amount to a taking has been decided and "stabilized". Williamson Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172 (188-94) (1985); United States v Dickerson, 331 U.S. 745, 749 (1947); Hart v City of Detroit, 416 Mich 488 (1982).

The State of Michigan has additionally held:

> A "taking claim" is an independent action, and it is the finality of the decisionmaker's decision that is an issue. Final decisions are not rendered less final because they are appealable. A taking claim is not a collateral attack on the decisionmaker's decision.

Miller Brothers v Department of Natural Resources, 203 Mich App 674 (1994). The State Court would never acknowledge their own law. A. 24.

Federal law conforms with Michigan law. Under 42 §1983, A. 47, Petitioner was not required to exhaust his remedy by attacking the ordinance, contesting the revocation of his license or appealing the underlying 1980 court action. Williamson Planning Commission v Hamilton Bank, 473 US 172; 174 (1985); Patsy v Florida Board of Regents, 457 US 496 (1982). "Taking" claims have unique characteristics that cause them to differ from all other types of claims under Title 42, §1983. "Taking" are a "postdeprivation process". Id. 195.

Petitioner concedes that had Petitoner's business been "shut down" in 1980, the "taking cause of action" would have accrued. But the property was not lost until 1984. From 1980 to 1984, this case is analagous to Williamson Planning, supra. The parties are still jockeying for position. Here, the Petitioner finally had none.

The state courts never understood it was the Respondent's first lawsuit in the State Court and the Respondent's actions therein that were the "cause of action" for a "taking". Petitioner's cause of action while that case was pending was not "ripe", federally or stately. Filing for Chapter 11 bankruptcy reorganization cannot be a "taking". Merely losing one's license cannot be a "taking".

The letter from the Respondent indicating they would "make it as difficult as possible", A.29, during the pending of that action is Petitioner's "taking".

Michigan Res Judicata

Res Judicata or "claim" preclusions prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding, Eliason Corporation v Bureau of Safety & Regulations of Michigan Department of Labor, 564 F. Supp 1298 (W.D. Mich 1983); Gore v Monroe Auto Equipment Co., 409 Mich 147, 294 N.W. 2d 165 (1980); provided (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits; In re Pardee, 190 Mich App 243, 475 N.W. 2d 870, 873 (1991), and (4) arises out of the same transaction, (acts done before one files suit), Gore v Monroe Auto Equipment, 409 Mich 147, 160 (1980); and (5) same facts or evidence are essential to the maintenance of the two actions Jones v State Farm Ins. Co., 202 Mich App 393, 401 509 N.W. 2d 829 (1993).

The two cause of actions, the "nuisance" suit and the "taking" suit are different transactions. The first does not have to be appealed to bring the second, nor is it precluded by "res

judicata".

Michigan has long held that a decision by a court is controlling res judicata until contradicted, reversed, or overruled by the court. Tebo v Hawlik, 418 Mich 350, 362, 379 (1984). The final judgment in the State's nuisance action was decided in Petitioner's favor when the successor gets a 36% increase in operating hours, the state case dismissed and the Respondent's regulations are found unreasonable. This action takes place after Petitioner's loss of the property and the Michigan 21 day period to appeal the permanent injunction. Who could have possibly forseen a new owner getting a 36% increase in operating hours.

Federal "Full Faith and Credit"

The Federal District Court of Western Michigan, A. 14, and the Sixth Circuit Court of Appeals, A. 1, based its ruling on Title 28 U.S.C. §1983, A. 46, which mandates that the federal courts give a prior state court adjudication the same effect it would have in a state court. However under Michigan law "lack of subject matter jurisdiction makes the decision absolutely void" Fox v Board of Regents of University of Michigan, 375 Mich 238 (1965); A Michigan court is "free to disregard an order void for lack of (subject matter) jurisdiction", Matter of Hague, 412 Mich App 532-544 (1982); "Lack of subject matter jurisdiction can be

collaterally attacked"; "A proven lack of subject matter jurisdiction renders a judgment void"; "it is the initial pleadings that give subject matter jurisdiction," In Re Hatcher, 433 Mich 426, 438, 439 (1993).

If "Full Faith and Credit" is the issue, the federal court, like the state courts, could not follow the second state court decision.

The "federal taking claim" is now ripe in the federal court.

"Catch 22"

In the book "Catch 22" you were sane if you flew your bombing missions if you thought only an insane person would so do; if you loved flying the missions you were insane, but this was what was wanted - you flew your missions. Some "catch".

In 1980 in state court, the Respondent files suit to enjoin Petitioner's primary operation of its business without a license. Petitioner's counter-claim there, relied upon by the state and federal courts says:

> "Paragraph 7: That at said hearings Counter-Defendant (Respondent here) unreasonably, arbitrarily, and without any pretense of due process. . by Michigan and Federal Case Law, revoked said license". .
>
> "Paragraph 8: That this

> revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished. . and void and of no effect under the constitution . . .
>
> "Paragraph 9: That the defendant's counter plaintiff. . have attempted to enforce through this court and through other proceedings and threatened to attempt to enforce this ordinance and the revocation of this license and to force and compel counter plaintff (Petitioner here) to cease operations." A. 32.

Paragraphs "7" and "8" are an attack on the reasonableness -unreasonableness of the revocation of his license. Paragraph "9" is a notification of the threatened ceasing of operation. These do not allege a "taking", nothing is lost.

Petitioner's predecessor continued to operate on and off until October 15, 1984 when it is permanently prohibited. In February 1986 the successor owner of the shredder, moved in State Circuit Court to set aside the permanent injunction, and commence operations. It happens. The shredder is once again operating as it originally was when Petitioner's privy (Superior) operated the shredder. It runs today. Petitioner's predecessor and

successor won in the 1980 state court proceeding getting a 36% increase in operating hours.

Petitioner files in (1987) in Federal Court, both a Federal and State "taking claim" against the Respondent which is promptly dismissed because Superior has not "utilized (state) procedures for obtaining compensation before bringing a 1983 action". A. 14.

Petitioner then filed (1989) in the State of Michigan Courts a State and Federal "taking" claim, the federal claim the Respondent has just successfully argued in federal court is not ripe for adjudication anywhere.

Respondent then moves for summary judgment alleging the State and Federal claim (not ripe in 1987), have been decided by the 1980 original lawsuit - res judicata - as "the same claim raised in Superior's earlier counter claim, which had been dismissed with prejudice . . .or if not previously raised could have and should have brought as an affirmative defense in the earlier action". The 1989 "State" case is barred by "res judicata". Some "catch". Respondent has both sides of the coin.

Petitioner appeals the State Circuit Court's decision, and the State Court of Appeals rules:

> "Plaintiff could have filed a specific taking claim in its 1980 counter claim, but did not.

> This we hold that its taking claim in the instant suit is barred by res judicata. . we find no merit in plaintiff's argument that a taking claim became "ripe only after the permanent injunction issued on October 15, 1984". Plaintiff might have brought an action for a temporary taking after defendant revoked its license in 1980 . . Plaintiff claims that the taking claim did not accrue until it filed for bankruptcy is equal meritless". A. 24.

A "temporary taking" means the property is "took" for a period of time, not that someone is "trying to take", or has diminished the value of or use of. The latter is regulation - not a taking. The mere revocation of a license is not a "taking".

Some "catch". Not a single federal case is cited in the Michigan Court of Appeals decision, nor does the Court speak of or distinguish state from federal takings.

The petition to Federal Bankruptcy Court for "corporate reorganization and relief from creditors" does not take the property and remove it from the ability of Superior to profitably operate. Hart, supra, beyond establishing the six-year Statute of Limitation, stands for the proposition that where there is a claim of injury to property, in order for the statute to commence running, the consequences of the

wrong or the "de facto taking" upon the Plaintiff by the Defendant must have "stabilized" in order for the limitation to run. Hart, supra, 504. If there is no "stabilization", the cause of action is not "ripe", under State Law, certainly not under federal law.

As noted in Agins v Tiburn, 447 U.S. 255, 65 L.Ed. 2d 106, 100 S.Ct. 2138, note 9:

> "Fluctuations in value during government decision making is not a taking. There is no controversy yet".

There is no taking in 1980 under the rationale of Agins, supra, since the actions of the City resulting in the impairing of this Plaintiff's ability to operate had not "stabilized". The "consequences" of the City's action did not stabilize until Petitioner was forced into a full Chapter 7 bankruptcy, on October 4, 1984. Petitioner's equal protection claim did not accrue until the successor was treated differently.

Petitioner files in Federal Court a ripe federal cause of action for a "taking", (1995). Defendant argues res judicata (the state proceedings) having previously argued Petitioner's claim not "ripe" for adjudication in federal court. Some catch.

The District Court rendered its opinion dismissing plaintiff's federal

complaint, on principles of "res judicata":

> "Similarly, plaintiff argues that the federal constitutional claim that he asserted in his 1989 case action was not ripe. However, plaintiff had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments, and the Michigan Court of Appeals addressed this issue. Plaintiff may not collaterally attack the state court's determination. Insurance Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982)." A. 14.

In affirming the District Court's opinion, the Sixth Circuit Court of Appeals ruled:

> "In addition, Remus argues that the federal constitutional claim asserted in his 1989 state court action was not ripe. However, Remus had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments there, and the Michigan Court of Appeals addresses this issue. Remus therefore may not collaterally attack the state court's determination. Ins. Corp of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 US 694,

> 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment")" A. 1.

This footnote cites two cases. Chicot County Drainage District v Baxter State Bank, 308 US 371 (1940); and Stoll v Gottlieb, 305 US 165 (1938). These cases involve an original action filed in fedeal court, an affirmative ruling for the plaintiff, the defendant then initiating a state court proceeding on the issue of subject matter jurisdiction to prohibit the affirmation ruling in the original federal suit, and the ruling that the defendant, now plaintiff in the state court proceedings, should have appealed the federal court decision on "subject matter jurisdiction".

Applying these two cases to the present action it was Respondent, who if it did not like the original decision (federal 1987) regarding the lack of subject matter jurisdiction, should have appealed that decision. It was Respondent who collaterally attacked Judge Gibson's decision in the second state court proceeding. "Full faith and credit" under these two decisions cannot be given.

Had Petitioner perfected its first Application for Certiori the decision must have been the state court did not have jurisdiction of the federal claim. This

decision leaves Petitioner remediless and makes no sense. The statute of limitations would have run.

The Sixth Circuit Court of Appeals likewise so held and went on to state "there is nothing to suggest that the Michigan Circuit Court lacked subject matter jurisdiction to hear Remus' claim". A. 2. Either the Federal District Court in 1987 is wrong or the Sixth Circuit Court of Appeals in 1997 is wrong as is wrong the 1980 state case or the 1989 state case. The state 1980 (issue in flux), federal 1987 (exhaust state taking - no ripeness), state 1989 (res judicata in 1980), and federal 1995 (res judicata in 1980) cases and court opinions are irreconcilable except under Petitioner's theories.

As Michigan defines Res Judicata, whether or not plaintiff did or did not allege a federal taking in its State action, is immaterial. That which could have been alleged is also precluded under the state theory of Res Judicata. Had plaintiff not alleged a federal taking cause of action he would still be bound, if it existed, by Michigan's theory of Res Judicata. Some "catch".

There is not a single reference in the Michigan Court of Appeals Decision to the "federal taking", or a single federal case noted.

Petitioner is entitled to a "full and fair opportunity to be heard" on its federal claim in state court. If not, any

Title 42 §1983 is not barred by state law "res judicata". Keemer v Chemical Construction Corporation, 456 U.S. 461 (1982); Allen v McCurry, 449 U.S. 90 (1980). Where the federal claim cannot be asserted the Petitioner could hardly be afforded a hearing, fair or otherwise. Davidson v Capuano, 792 F.2d 275 (2nd Cir. 1986); Miller v Hartwood Apartments, 689 F.2d 1239 (5th Cir. 1982), nor where the state judicial review was narrow and conclusionary. Scroggins v Kansas, 802 F.2d 1289 (10th Cir. 1986).

The State of Michigan is unable or unwilling to protect Petitioner's Federal Constitutional rights.

Some "full and fair opportunity to be heard".

The only explanation is the state knew there was no federal claim before it to decide and the state courts realized that they did not have federal claim jurisdiction. Federal taking claim is not distinguished from that of the state claim in the state courts.

Title 42, § 1983, A. 47, will overcome a claim of State Res Judicata where the state law does not provide a full and fair opportunity to litigate the claim or issues presented to it. Allen v McCurry, 449 U.S. 90 (1980).

The United States Supreme Court has no authority to review a state court decision based solely on state law.

But it gets worse.

In the prior state case, Petitioner's

here, Defendant's there, counterclaims and affirmative defenses were simply dismissed. Defendant's there, Petitioner's here, claims were never decided on the merits. There being no trial or nothing amounting to a hearing on any of those claims. The State Circuit Judge took "testimony" to the extent it was taken in a curious manner. The state court asked people to rise in the audience, make unsworn statements on the record, and took "statistical information" by simply asking them to testify by raising their hand and voting on certain issues. The judge permitted unsworn "witnesses" from the audience to read from letters of others.

In this hearing in 1984, four years into the lawsuit, the judge concludes·

> "I am convinced. . . that vibrations through the earth operate in strange ways". . . "to show you in simple terms, without any legal jargon, if I can, the City of Kalamazoo wants to shut down Mr. Rosenberg, (the operative word here is "wants").

When the above is coupled with the State of Michigan Appeal Court decisions, unpublished, in direct conflict of Michigan's published law. Petitioner has never had a "fair and full" opportunity to litigate its "federal taking" claim.

What has happened here is only to one citizen.

If the State of Michigan wishes to make the revocation of a license a "taking", or the "filing of Chapter 11" "reorganization" bankruptcy a "taking", so be it.

If the State of Michigan wishes to say as of the 1980 filing of the first state action is a "taking", so be it.

Federal law supports none of these propositions.

Events may lead to a state "taking" that are not yet a federal "taking".

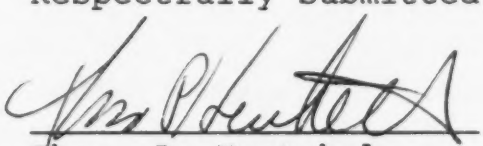
So it is here when the State of Michigan denied compensation Petitioner's federal taking claim accrued.

"Full Faith and Credit" does not apply.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari or in the alternative, simply remand this matter to the trial court for trial as the issue is clear.

Respectfully Submitted,



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